

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BEATRICE BAUR,

Plaintiff,

vs.

Case No. 2005-2612-NO

MACOMB MALL, L.L.C.,
a Michigan Limited Liability
Company,

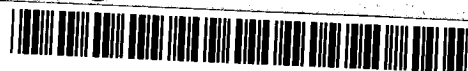
Defendant.

OPINION AND ORDER
OF THE COURT

This matter is before the Court on defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

I.

Plaintiff alleges that on June 5, 2004, she had been a business invitee on defendant's premises at approximately 4:30 P.M. She alleges that she was walking from the parking lot towards the National Coney Island when she slipped and fell as the result of a "dip" underneath the curb that separated the concrete walkway from the black asphalt parking lot. Further, she alleges that the hazard was hidden from her view inasmuch as a shadow line between the concrete curb and asphalt parking lot gave the appearance of an unobstructed, consistent parking surface. She alleges that she



sustained serious injuries from the accident, including, but not limited to, a scalp laceration, traumatic contusion of the right shoulder, and a torn right shoulder rotator cuff.

In the motion at hand, defendant first contends that the alleged danger had been "open and obvious." Defendant also maintains that the curb had not been unreasonably dangerous. However, plaintiff disputes such arguments.

II.

In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the pleadings, as well as any affidavits, depositions, admissions, and documentary evidence submitted by the parties. The evidence should be construed in the light most favorable to the party opposing the motion. The motion should be granted if the evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(G)(4)-(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). It is not sufficient for the non-movant to promise to offer factual support for his position at trial. *Smith, supra*, at 457-458 n 2. Instead, the adverse party must produce evidence demonstrating that there is a genuine issue of material fact. MCR 2.116(G)(4).

III.

It is well-settled that a property owner must maintain his premises in a reasonably safe condition and is under a duty to exercise due care to protect his invitees from conditions which might result in injury. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992). However, the owner will not be liable to invitees for physical harm caused by an "open and obvious" danger on the land, unless

the owner should anticipate the harm despite such knowledge or obviousness. *Id.* at 94. The test for determining whether a danger is "open and obvious" is whether an average user with ordinary intelligence would have been able to discover it and the associated risk upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

Where the alleged hazardous condition is a common occurrence, such as steps, there must be something unusual about the steps because of their character, location, or surrounding conditions before the owner's duty of reasonable care will be triggered. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614, 616-617; 537 NW2d 185 (1995). Absent such a showing, there is an overriding public policy which encourages individuals to take reasonable care for their own safety. *Id.* A plaintiff will not raise a genuine issue of material fact merely by asserting that she failed to see the alleged hazard. *Id.* at 621.

IV.

Plaintiff testified that the June day in question had been warm, sunny, and dry. See Beatrice Baur's deposition at 20. At the time of the accident, it had still been light outside and she had not had experienced any difficulty in seeing where she was going. *Id.* She had been watching the ground in front of her as she was walking along towards the sidewalk. *Id.* at 22. As she stepped up onto the sidewalk with her left foot, the toe on her right foot became trapped in a "dip" below the curb, which caused her to fall forward and hit her head on a planter. *Id.* at 23-24, 58. When she fell, she did not know what had caused the accident. *Id.* at 30. However, she went back to the scene several days later and observed that there was a "dip" just before the asphalt reached the cement. *Id.* at 29. That was the first time that she had noticed the "dip." *Id.* at 63.

Although she had not seen the “dip” on the day of the accident, she was sure that it had caused her to trip and fall. *Id.* at 62-63. She testified that she would have stepped over the “dip” had she seen it on the day of the accident. *Id.* at 66. Yet, she indicated that, to the best of her knowledge, there had not been anything hiding or obscuring the “dip.” *Id.* at 33-34. She further stated that there had not been anything different between the day of the accident and the day that she returned to the accident scene. *Id.* at 34.

In considering the evidence in the light most favorable to plaintiff, the Court is satisfied that plaintiff has failed to show that the alleged hazard had not been “open and obvious,” as defined under *Joyce, supra*. The Court points out that the alleged hazard had been apparent to plaintiff when she returned to the scene of the accident. Since she testified that there had not been anything different between the time of her accident and the time that she returned to the scene, it is reasonable to assume that the alleged hazard should also have been apparent to her on the date that she fell.

In any event, the Court opines that the curb itself had not been unusual or unreasonably dangerous. *Bertrand, supra*. To avoid the alleged hazard, plaintiff simply had to step up onto the curb and over the “dip.” Public policy encourages plaintiff to take reasonable measures to protect her own safety. *Id.*

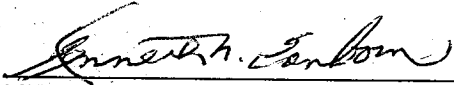
Under these circumstances, the Court concludes that defendant is entitled to the entry of summary disposition pursuant to MCR 2.116(C)(10). *Smith, supra*.

V.

For the reasons set forth above, defendant’s motion for summary disposition, pursuant to MCR 2.116(C)(10), is GRANTED. Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order*.

In compliance with MCR 2.602(A)(3), the Court finds that this decision resolves the last pending issue. This case shall close upon the entry of judgment.

IT IS SO ORDERED.


KENNETH N. SANBORN, Visiting Judge

Dated: June 9, 2006

cc: Francis M. Fitzgerald, Atty for Pltf
Lee C. Patton, Atty for Deft

/amk

A TRUE COPY


Carmella Sabough
COUNTY CLERK

BY

DEPUTY CLERK